No. 17-269

In The Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, ALASKA TROLLERS ASSOCIATION, INSTITUTE FOR FISHERIES RESOURCES, FLY FISHERS INTERNATIONAL, NORTHWEST SPORTFISHING INDUSTRY ASSOCIATION, NORTHWEST GUIDES AND ANGLERS ASSOCIATION, ASSOCIATION OF NORTHWEST STEELHEADERS, AND THE CONSERVATION ANGLER IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI CURIAE[1]

Amici include non-Indian commercial and sport fishing groups, representing fishing families and businesses that rely on Washington's salmon runs for their livelihood and way of life. With Pacific Coast salmon populations reduced to less than 5% of historical levels, restoration of salmon habitat is critical to preservation of the economic, cultural, and social interests of these groups. Washington's culverts prevent salmon from reaching key spawning and rearing habitat, further harming these already imperiled populations and jeopardizing the fishing industry jobs and communities that Amici represent.

Amici Pacific Coast Federation of Fishermen's Associations, Alaska Trollers Association, and Institute for Fisheries Resources represent commercial fishing families throughout the Pacific Northwest and Alaska. Pacific Coast Federation of Fishermen's Associations is the largest trade association of commercial fishermen on the West Coast. Its members include the Washington Trollers Association and a number of other commercial fishermen's associations, vessel owners' associations, port associations, and marketing associations. Institute for Fisheries Resources is dedicated to

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[1] Pursuant to Rule 37 of the Rules of the U.S. Supreme Court, the undersigned represent that (1) all parties consented to the filing of this brief; (2) no counsel for any party authored this brief in whole or in part; and (3) no person or entity other than the above-named amici curiae and their counsel made a monetary contribution to the preparation or submission of this brief.

marine resource protection and conservation. Alaska Trollers Association represents Alaska's commercial salmon trollers, who are impacted by Washington's barrier culverts because many of the salmon that spawn in Washington streams are caught in ocean waters off the coast of Alaska.

Amici Fly Fishers International, Northwest Sportfishing Industry Association, Northwest Guides and Anglers Association, Association of Northwest Steelheaders, and The Conservation Angler represent sport fishers and family-owned businesses catering to anglers in the Pacific Northwest. Fly Fishers International is dedicated to promoting fly fishing as a recreational use of aquatic resources and to preserving, protecting, and restoring aquatic resources. Northwest Sportfishing Industry Association is a trade organization of nearly 300 sporting goods manufacturers, wholesalers, retailers, marinas, and guides in Washington and Oregon. Northwest Guides and Anglers Association represents fishing guides, charters, and sport anglers in Washington and Oregon. Association of Northwest Steelheaders represents sport anglers dedicated to enhancing and protecting Northwest fisheries and their habitats. The Conservation Angler advocates for wild fish and fisheries, protecting and conserving wild steelhead, salmon, trout and char throughout their Pacific range.

SUMMARY OF ARGUMENT

Washington's salmon fisheries are vital to non-Indian fishing families in Washington and Alaska, and local communities and cultures throughout both states. Salmon fishing has provided economic opportunity and a way of life for generations. Culverts owned by the State of Washington block access to vast areas of salmon habitat and spawning grounds, crippling these fisheries. Harm to Washington's salmon fisheries directly harms fishing families and businesses throughout the Northwest and Alaska. The district court correctly found that injunctive relief was necessary to address the harm caused by the State's culverts. Moreover, the district court correctly found that the injunction ordering replacement and repair of these barrier culverts was in the public interest. Amici respectfully submit that the injunctive relief ordered by the district court and upheld by the Court of Appeals should be affirmed in all respects.

ARGUMENT

I. SALMON RUNS IN WASHINGTON HAVE SUPPORTED A WAY OF LIFE FOR GENERATIONS OF FISHING FAMILIES AND COMMUNITIES.

A. Salmon Are An Integral Part Of Life In The Northwest.

Salmon are so important to Washington and its residents that they have achieved iconic status, bound tightly to many Washington citizens' commercial and cultural identities. Salmon iconography is omnipresent in advertising and artistic renderings throughout the state. Famous chefs' menus, grocery stores, and farmers' markets feature local salmon, and communities throughout Washington celebrate the return of salmon with festivals, competitions, and public art displays. The City of Westport on the Washington coast, for example, proclaims itself the "Sport-Fishing Capital of the World," and offers a $10,000 prize for the largest chinook salmon caught off a Westport charter boat.[2] The City of Issaquah at the foothills of the Cascade Mountains hosts a "Salmon Days" festival complete with a parade, concerts, a farmers' market, and vendor stalls offering all things salmon.[3] The City of Olympia, Washington's capital, proudly displays

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[2] Westport-Grayland Chamber of Commerce and Visitors Center, *Fishing Information*, http://westportgrayland-chamber.org/fishing_info.php.

[3] The Greater Issaquah Chamber of Commerce, *Salmon Days 2018*, https://www.issaquahchamber.com/salmondays.

salmon created by local artists to promote dialogue about salmon – "our heritage and our children's inheritance."[4] Further north, the City of Bellingham invites visitors and residents to connect to the community's history by visiting the Whatcom Creek Salmon Art Trail, which features a series of artworks "[u]sing salmon and salmon habitat as a window into this place."[5] Salmon are woven into the cultural fabric of the entire state.

While many Washington residents value salmon, none more than the fishing families who depend on salmon for their livelihoods. Commercial fishing generates jobs in smaller coastal communities that lack the diversity of economic opportunity present in major urban areas.[6] For example, in 2015, the Washington coast town of Westport had under 2,000 residents and over 600 were employed in commercial fishing

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[4] City of Olympia, *Olympia Salmon Run*, http://olympiawa.gov/city-services/parks/public-art/olympia-salmon-run.aspx.

[5] City of Bellingham, *Whatcom Creek Salmon Art Trail*, https://www.cob.org/documents/parks/parks-trails/salmon-art-trail.pdf.

[6] Community Attributes Inc., *Washington State Maritime Sector Economic Impact Study* at 37-40 (2017), https://www.maritimefederation.com/uploads/2/9/9/6/29962189/cai.wmf.maritime_cluster_study_2017_update.2017_0413.pdf. *See also* Wash. Dep't of Fish and Wildlife, *Final Report: Economic Analysis of the Non-Treaty Commercial and Recreational Fisheries in Washington State* at 12 (2008 & Supp. 2012), https://wdfw.wa.gov/publications/00464/wdfw00464.pdf [hereinafter *Final Report*]; Gordon Gislason & Gunnar Knapp, *Economic Impacts of Pacific Salmon Fisheries*, Pacific Salmon Comm'n, at 27 (2017), *available for download at* http://www.psc.org/download/333/special-reports/9337/economic-impacts-of-pacific-salmon-fisheries.pdf.

activities.[7] In 2016, commercial salmon landings in Washington State were about 15.8 million pounds, valued at more than $26 million at *ex-vessel* (point of landing) wholesale prices.[8] The majority of Washington's commercial fishing jobs stem from the watersheds covered by the injunction in this case.[9] Alaska's fishing families also depend on Washington's salmon because many of the salmon caught off the coast of Southeast Alaska are from Washington.[10] In 2016, commercial salmon landings in Alaska were 542.6 million pounds, valued at $380.5 million.[11]

It is not only fishing families that rely on salmon for their livelihoods. From boat builders to seafood processers, commercial salmon fishing generates many

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[7] Community Attributes Inc., *supra* n.6, at 40.

[8] Nat'l Marine Fisheries Serv., *Fisheries of the United States* at xxiii (2016), *available for download at* https://www.fisheries.noaa.gov/resource/document/fisheries-united-states-2016-report. *See also* Gislason & Knapp, *supra* n.6, at 12 (showing 2015 harvests with *ex-vessel* value of over $27.5 million for Washington).

[9] *Compare* Community Attributes Inc., *supra* n.6, at 33 (commercial fishing and seafood processing jobs by Washington county in 2015) *with* JA 286a-287a (maps of Case Area).

[10] *See* William D. Templin & Lisa W. Seeb, *Clues to Chinook Salmon Nearshore Migration in Southeast Alaska from Estimates of Stock Composition in Troll Harvests*, Alaska Dep't of Fish and Game, https://www.adfg.alaska.gov/static/fishing/PDFs/research/chinook_migration_poster.pdf (showing the origins of chinook salmon caught in the commercial troll fishery in the nearshore waters of Southeast Alaska).

[11] Nat'l Marine Fisheries Serv., *supra* n.8, at xxiii (values at *ex-vessel* wholesale prices). *See also* Gislason & Knapp, *supra* n.6, at 12 (showing 2015 harvests with *ex-vessel* value of over $111 million for Southeast Alaska).

additional jobs in Washington and Alaska. In 2015, Washington's commercial fishing and seafood processing sector employed 15,900 workers and generated $9.4 million in revenue.[12] And in 2013, the Alaska seafood industry created 23,900 jobs and $1.34 billion in labor income in the Puget Sound region, including jobs attributable to commercial fishing (active permit owners and crew members who travel to Alaska to fish) and Washington-based processing of Alaska-caught seafood.[13] Between 2012 and 2015, an average of 5,380 full-time equivalent jobs in Alaska and 3,090 full-time equivalent jobs in Washington were attributable to the commercial salmon fishing industry alone.[14] Like the commercial fishing jobs, many of the additional jobs generated by the fishing industry are located in smaller coastal communities that are heavily dependent on the fishery.[15]

Sport fishing is also a major economic driver in the Pacific Northwest, especially in smaller communities. In Washington in 2006, 142,000 anglers fished recreationally for salmon and another 113,000 fished for

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[12] Community Attributes Inc., *supra* n.6, at ii.

[13] *See* Seattle Metropolitan Chamber of Commerce, *Ties That Bind: The Enduring Economic Impact of Alaska on the Puget Sound Region* 18-22 (2015), https://www.seattlechamber.com/docs/default-source/Events-and-Programs-Documents/ties-that-bind-report-feb-2015.pdf?sfvrsn=2.

[14] *See* Gislason & Knapp, *supra* n.6, at iv, 14.

[15] *See Final Report*, *supra* n.6, at 12 (These jobs are "important at the community level along the Washington Coast, the Strait of Juan de Fuca, and the Puget Sound areas.").

steelhead.[16] From fishing guides to small bait-and-tackle store owners, from drift boat dealers to local hotel proprietors, from authors of fishing guides to local restaurants, from charter boat operators to outfitters, the economic ripple effect from these hundreds of thousands of anglers is huge. A 2010 report concluded that Washington's annual economic activity from sport fishing generates $1.1 billion in economic activity and 14,655 associated jobs.[17] On average between 2012 and 2015, salmon sport fishing and associated industries contributed 3,160 full-time equivalent jobs in Washington and 1,220 full-time equivalent jobs in Alaska.[18] During those same years, the average total economic impact of the salmon sport fishing industry was $394 million in Washington and $153 million in Alaska.[19]

These numbers tell only part of the story. Salmon fishing is more than a livelihood; it is a way of life for commercial and sport fishing families alike. Amy Grondin, a member of Amici Washington Trollers Association and Alaska Trollers Association, makes her living as a commercial salmon fisherman in Washington and Alaska, fishing with her husband Greg off of the F/V *Duna*, a forty-foot wooden fishing boat built in

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[16] *Id.* at 18.

[17] Wash. Dep't of Fish and Wildlife, *Fish, Wildlife and Washington's Economy* at 1 (2010), https://wdfw.wa.gov/publications/01145/wdfw_01145.pdf.

[18] Gislason & Knapp, *supra* n.6, at v.

[19] *Id.* at 18-23.

1936 in Tacoma.[20] A life devoted to fishing can even teach you to love the smell of marine engine fuel – she writes that "[i]t is a smell that for days on end scents your waking hours, tea breaks and drea..nless sleeps when the deck work has battered you just enough to hurt but not break you. . . . Diesel perfume is a smell you eventually wash from your clothes after a few weeks back on land when season is done but one that never leaves you. It will summon all of Alaska back to the surface when on a dark night it unexpectedly greets you at the wheelhouse door in Seattle."[21] River guides spend a lifetime learning and sharing the tips that lead to the best catch.[22] Behind the *ex-vessel* values and numbers of full-time equivalent jobs are individuals and communities whose cultural and personal attachment to salmon is integral to their identity.

In addition to those who earn their living fishing, there are many more for whom fishing for salmon is a defining part of their cultural lives. Some learned to tie a fly from a parent or grandparent; others have newly discovered a sense of place on the water. Great salmon fishing trips become life milestones that are never forgotten. A father remembers the "indelible impression" left by the first large chinook salmon his son landed on

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[20] Amy Grondin, *Gogreen Seattle Conference 2014 Presentation*, WordPress (May 2, 2014), https://fishequalsfood.com/2014/05/02/gogreen-seattle-conference-2014-presentation/.

[21] Amy Grondin, *Diesel Perfume*, WordPress (Oct. 22, 2014), https://fishequalsfood.com/2014/10/22/diesel-perfume/.

[22] Steven Lane, *To Catch Fish, Keep Clean*, Columbian (Feb. 4, 2010), http://www.columbian.com/news/2010/feb/04/guide-cleanliness-a-key-to-catch-salmon-steelhead/.

his own, on a float down the Hoh River in Washington: "With me handling the oars and him up front setting out the plugs, the magic happened. After a crushing strike, a perfect hook-set and a few sizzling runs that saw us chase that big springer downriver more than 200 yards, I slipped the net under a gorgeous 35-pound hen [female fish] that his 8-year-old arms could barely lift for a photo."[23] A fly fisherman remembers hooking his first pink salmon in Washington 20 years earlier: "A silver-bright pink salmon hit on my first cast and we both were hooked; she on that pink squid, me on fly fishing for pinkies."[24] A retired guide can recall every move in an epic battle with the one that got away, a 60-plus pound chinook (king) salmon on the Humptulips River near Aberdeen, Washington.[25] Even 20 years later, "it feels like it happened just before lunch today. I remember every detail of it. That one will stay with me forever."[26] Salmon fishing is a tradition to be shared and cherished for many in Washington. For cultural, commercial, and recreational interests alike, salmon are invaluable to life in the Pacific Northwest.

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[23] Kris Olsen, *Doctor's Orders: Fall Steelhead*, Anglers Journal (Dec. 13, 2017), https://www.anglersjournal.com/people/doctors-orders-fall-steelhead.

[24] David Paul Williams, *Puget Sound Pinks*, American Angler, https://www.americanangler.com/puget-sound-pinks/.

[25] William Sisson, *I Almost Couldn't Breathe*, Anglers Journal (May 25, 2016), https://www.anglersjournal.com/columns/almost-couldnt-breathe.

[26] *Id.*

B. Declining Salmon Runs Threaten Livelihoods And Entire Communities.

Salmon and steelhead are disappearing from Washington and the Pacific Northwest at alarming rates. Once too numerous to count, these fish today persist at only a small fraction of their historic abundance. The collapse of what were once the world's largest runs of salmon and steelhead has led the National Marine Fisheries Service to protect 28 different salmonid populations as either threatened or endangered under the federal Endangered Species Act. Many other populations are already extinct. The elimination and degradation of available salmon habitat has been a major factor in this decline. No party disputes these basic and disturbing facts. Pet. App. 136a ("Today, while some salmon stocks in the Case Area are healthy, others are depressed, in danger of extinction, or already extinct.") (facts admitted by all parties). *See also* Pet. App. 132a ("Since Treaty time, overharvest, habitat alteration, poor hatchery practices, and hydropower development are some of the human-caused factors that have greatly reduced the abundance of salmon available for tribal harvest in the Case Area.").

Salmon are in trouble, and so are the fishing families who depend on them. When fewer salmon return from the ocean to Washington's rivers, this translates directly to lower catch limits, shorter seasons, and a reduced ability for commercial fishing families to earn

a living.[27] Salmon harvests fluctuate from year to year, but the overall trend has been one of sharp decline. *See, e.g.*, JA 204a-205a (showing declining trend in salmon harvest in western Washington by species from 1974 through 2003); JA 591a; JA 590a. Chinook (king) salmon and coho salmon are the most commercially valuable of western Washington's salmon species,[28] and these are the species that have seen some of the steepest declines.[29] From 1950 to 1955 in Washington, commercial landings of chinook salmon averaged 10,248,683 pounds and coho averaged 11,779,067 pounds, but from 2011 to 2016, chinook landings averaged only 5,866,870 pounds, a reduction of about 43%, and coho landings averaged only 3,102,894 pounds, a reduction of about 74%.[30]

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[27] *See* Pacific Fishery Management Council, Pacific Coast Salmon Fishery Management Plan (Mar. 2016) at 27-30, http://www.pcouncil.org/wp-content/uploads/2016/03/FMP-through-A-19_Final.pdf. *See also* Pacific Fishery Management Council, Salmon: Background, https://www.pcouncil.org/salmon/background/.

[28] *See* Gislason & Knapp, *supra* n.6, at 12 Exh. 2 (compare weight landed with *ex-vessel* value).

[29] *See* Wash. State Recreation and Conservation Office, Governor's Salmon Recovery Office, *State of Salmon in Watershed 2016* at 2 (showing declining trend in non-tribal chinook and coho harvests from the 1970s through 2015), https://stateofsalmon.wa.gov/governors-report-2016/.

[30] Nat'l Marine Fisheries Serv., Annual Commercial Landing Statistics (searchable by state, species, and year), https://www.st.nmfs.noaa.gov/commercial-fisheries/commercial-landings/annual-landings/index.

Washington's salmon sport fisheries have also been declining for decades.[31] From 1971 to 1974, the annual sport salmon catch in Washington averaged 1,224,881 salmon, but from 2010 to 2015, it dropped to an average of only 783,185 salmon, a reduction of about 36%.[32] As with the commercial fisheries, the more valuable fisheries have seen the steepest declines. Excluding pink salmon (a numerous but less valuable species[33]), the sport catch in Washington dropped during 2010 to 2015 to an average of only 539,584 salmon, a decline of 56% from the 1971 to 1974 average.[34]

Runs are so depleted that Washington's Department of Fish and Wildlife must sometimes close certain streams or runs to sport fishing for an entire season, including some of Washington's most popular

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[31] *See* Eric Kraig & Tracey Scalini, 2015 Washington State Sport Catch Report, Washington Department of Fish and Wildlife (Feb. 2017) at 14 tbl. 4 (showing declining trend in the annual sport fishing catch from the 1970s through 2015), https://wdfw.wa.gov/publications/01886/wdfw01886.pdf; Community Attributes Inc., *supra* n.6, at 29 Exh. 19 (graph of Washington Department of Fish and Wildlife sport catch report data).

[32] *See* Kraig & Scalini, *supra* n.31, at 14 tbl. 4.

[33] *See* Wash. Dep't of Fish and Wildlife, Species Info, https://wdfw.wa.gov/fishing/washington/Species/9009/ (pink salmon runs only occur in Washington in odd-numbered years); Kraig & Scalini, *supra* n.31, at 3 (nearly 40% of the total recreational salmon catch in Washington in 2015 were pink salmon); Gislason & Knapp, *supra* n.6, at 12 Exh. 2 (compare weight landed with ex-vessel value).

[34] *See* Kraig & Scalini, *supra* n.31, at 14 tbl. 4 (average of total sport catch in even numbered years – 2010, 2012, and 2014 – is 539,584).

rivers.[35] For example, the Skagit is "a storied river [with] a history of producing larger and numerous native steelhead."[36] It was deservedly popular with sport fishers: "The water below the Cascade [a tributary that feeds into the Skagit] is broad and relatively flat with long even riffles and runs. In other words, perfect fly water."[37] While there are also summer sport fisheries in the Skagit, "[a]s the days move into the new year, the prize fish of the system, the native winter steelhead, become a distinct possibility and anglers pursue these fish religiously through the end of the season at the end of April. There are only a few places in the world where you can pursue native steelhead as winter turns to spring and the Skagit is one of the best places to do it."[38] But precariously low numbers of returning steelhead has forced the closure of this popular sport fishery for many years.[39]

The decline of Washington's salmon runs has a significant human cost. Tele Aadsen, a member of Amicus Alaska Trollers Association, fishes commercially out of southeast Alaska with her partner Joel off of "our girl,

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[35] Wash. Dep't of Fish and Wildlife, Recreational Salmon Fishing, When & Where to Fish for Salmon, https://wdfw.wa.gov/fishing/salmon/whenwhere/.

[36] The Avid Angler, Skagit River, WA, http://www.avidangler.com/FC_skagit.html.

[37] *Id.*

[38] *Id.*

[39] *See* Mark Yuasa, Emergency closure for winter steelhead likely on Skagit, The Seattle Times (Dec. 24, 2011), https://www.seattletimes.com/sports/other-sports/emergency-closure-for-winter-steelhead-likely-on-skagit-outdoor-notebook/.

the F/V *Nerka*."[40] She writes that even when the fishing is good, it can be a hard profession. Long days and years on the boat wears bodies down.[41] The sea can claim boats and lives of friends and loved ones.[42] But it is that much harder when each day comes with the financial strain of not knowing whether the season's catch will carry you through the year. "Every fish counts. . . . Joel and I sat surrounded by sheets of numbers: lists of anticipated winter expenses, balances of fish already sold, conservative estimates of what we could expect to yet be paid. When you're young, self-employed in an unpredictable industry and looking at a long, uncertain off-season, the decision to quit a few days early could mean the cost of several months' mortgage, car repairs, or a long-over-due trip to the dentist."[43] Shorter and less predictable sport fishing seasons mean that businesses that cater to sport anglers have been "suffocating for years," as the Director of Amici Northwest Sportfishing Industry Association has explained. "In particular, the smaller businesses

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[40] Tele Aadsen, *Vanishing Boats, Lost Fishermen, and the Price of Fish*, WordPress (Mar. 12, 2012), http://www.teleaadsen.com/vanishing-boats-lost-fishermen-and-the-price-of-fish.

[41] Tele Aadsen, *Scenes of King Salmon Trolling*, WordPress (Aug. 25, 2012), http://www.teleaadsen.com/scenes-of-king-salmon-trolling-part-1.

[42] Aadsen, *Vanishing Boats*, *supra* n.40.

[43] Tele Aadsen, *How to End the Salmon Season (aka Selective Memory, the Fisherman's Friend)*, WordPress (Oct. 3, 2011), http://www.teleaadsen.com/how-to-end-the-salmon-season-aka-selective-memory-the-fishermans-friend.

are folding like chairs – we lost The Duffle Bag last year, a chain of three outdoors retailers in Seattle."[44]

For Washington's coastal communities that rely on the fishing economy, this decline has been devastating.[45] Fishing-dependent communities such as Westport and the areas surrounding Willapa Bay have been hit so hard by exceptionally low catches in 2015 and 2016 that the U.S. Secretary of Commerce has declared them eligible for federal disaster relief.[46] Especially for younger and less established fishermen, years as bad as these do not just mean a tighter belt for a season. As the Director of Amicus Washington Trollers

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[44] Mark Graves, Five Questions with Liz Hamilton, executive director of the Northwest Sportfishing Industry Association, The Oregonian/Oregon Live (Mar. 11, 2009), http://www.oregonlive.com/business/index.ssf/2009/03/five_questions_with_liz_hamilt.html.

[45] Gislason & Knapp, *supra* n.6, at 27; Community Attributes Inc., *supra* n.6, at 37-40 (discussions of Ilwaco, Chinook, Willapa Harbor, and Westport).

[46] John Ewald, *Commerce Secretary Pritzker Declares Fisheries Disasters for Nine West Coast Species*, Nat'l Oceanic and Atmospheric Admin. (Jan. 19, 2017), http://www.noaa.gov/news/commerce-secretary-pritzker-declares-fisheries-disasters-for-nine-west-coast-species. *See also* U.S. Dep't of Commerce, Nat'l Oceanic and Atmospheric Admin., Letter of Determination on 2016 Ocean Salmon Troll Fishery (Jan. 18, 2017), http://www.nmfs.noaa.gov/sfa/management/disaster/determinations/73_ocean_salmon/determination.pdf; U.S. Dep't of Commerce, Nat'l Oceanic and Atmospheric Admin., Letter of Determination on 2015 Grays Harbor and Willapa Bay Fisheries (Jan. 18, 2017), http://www.nmfs.noaa.gov/sfa/management/disaster/determinations/72_coho_salmon/determination.pdf; Jay Inslee, State of Wash. Office of the Governor, Letter to Penny Pritzker, Secretary of Commerce, U.S. Dep't of Commerce (letter dated Sept. 14, 2016), http://www.nmfs.noaa.gov/sfa/management/disaster/determinations/72_coho_salmon/request.pdf.

Association explained, "[w]e have a number of younger guys who have bought charter boats, not established yet, holding on by a thread from their boats going back to the bank."[47] With salmon populations hovering at such precariously low levels, the significant increase of spawning and rearing habitat that will result from removal of the State's barrier culverts would be a lifeline for salmon and fishing families alike. The district court correctly found that removal of the State's barrier culverts would immediately benefit these imperiled populations, and the district court's injunction is an essential step to preserving these valuable runs.

II. INJUNCTIVE RELIEF REQUIRING THE TIMELY REMOVAL OF BARRIER CULVERTS IS CRITICAL TO THE HEALTH OF WASHINGTON'S SALMON RUNS.

Salmon have thrived in the Pacific Northwest for millennia. Using both fresh and salt-water habitats, these anadromous species' diverse survival strategies have enabled them to survive the ever-changing and sometimes violent nature of a region prone to earthquakes, drought, mudslides, wildfire, floods, and volcanic eruptions. These remarkable fish are born in freshwater streams across Washington and the Pacific Northwest. After varying amounts of time in freshwater, they migrate downstream hundreds of

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[47] Dan Hammock, *Commercial Fisheries Disaster Opens Door to Federal Relief for Washington Communities*, Spokesman-Review (Jan. 23, 2017), http://www.spokesman.com/stories/2017/jan/23/commercial-fisheries-disaster-opens-door-to-federa/.

miles to the ocean where they range for thousands of miles, feeding and growing for several years before fighting their way back upstream to the same waters where they were born to spawn and die. Along the way, salmon and steelhead are vital prey for countless species, from other fish to bears, eagles, whales, and humans.[48]

Culverts that block streams and prevent salmon from reaching their freshwater habitat interrupt this cycle at every turn. Barrier culverts block mature salmon traveling upstream from freshwater habitat where they can spawn. Pet. App. 160a-161a. For those salmon that are able to access what habitat remains to spawn, the resulting juvenile salmon must also contend with culverts that block their passage, both as they search for ideal rearing habitat in freshwater streams and once they eventually migrate downstream to the ocean. Pet. App. 160a.

The amount of habitat that these barriers eliminate is huge: as the district court found, "[f]isheries scientists have identified approximately 1,000 miles of stream, comprising nearly 4.8 million square meters of stream habitat upstream of blocked culverts." Pet. App. 157a. And less habitat where fish can reproduce means fewer fish. The district court found that "[s]almon production is directly related to the amount and quality of habitat available. Loss and degradation of habitat have greatly reduced salmon production in the Case

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[48] *See generally* Thomas P. Quinn, *The Behavior and Ecology of Pacific Salmon and Trout* (1st ed. 2005).

Area." Pet. App. 158a. Increasing available spawning habitat by removing culverts that block fish, on the other hand, can lead to rapid increases in salmon populations. As the district court found, removing barrier culverts "provides immediate benefit in terms of salmon production, as salmon rapidly re-colonize the upstream area and returning adults spawn there." Pet. App. 166a-167a.

Barrier culverts are not the only challenge that salmon populations face. But the district court correctly found that they are a major part of the problem. Pet. App. 162a ("State-owned barrier culverts are so numerous and affect such a large area that they have a significant total impact on salmon production."). In this proceeding, the district court ordered Washington to replace culverts that block salmon from reaching spawning and rearing habitat. The district court correctly found that replacing the State's barrier culverts will significantly benefit salmon, and the public interest strongly supports the grant of injunctive relief. The injunction should be upheld.

A. Barrier Culvert Removal Is Necessary To Increase Salmon Runs.

Washington openly acknowledges that "[s]almon fishing has played an important role in the economy and culture of the Pacific Northwest for centuries."[49]

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[49] Wash. Dep't of Fish and Wildlife, *Role in Recovery*, https://fortress.wa.gov/dfw/score/score/harvest/harvest.jsp. *See also* Wash. State Recreation and Conservation Office, *supra* n.29, at 1

See also Wash. Br. 9 ("Salmon have long been a vital part of Washington's economy and culture . . . "). Washington also acknowledges the significant benefits that flow from salmon recovery efforts: "salmon recovery brings multiple benefits from clean water to more resilient communities, salmon recovery efforts provide a high return on investment for the state and its residents."[50] The economic benefit of salmon recovery measures is substantial; Washington's governor has found that every $1 million spent on watershed restoration in Washington generates $2.2-$2.5 million in total economic activity for Washington and 15 to 33 new or sustained jobs.[51]

Washington also does not fundamentally dispute that replacing barrier culverts is one of the most effective salmon recovery measures it could take – nor could it, given the State's own repeated statements on the importance and impact of culvert replacement. For example, a recent report by the Washington governor's office finds that "[r]emoving barriers, such as inadequate culverts beneath road crossings or ineffective fish ladders at low head dams, allows salmon to quickly return to their historic spawning grounds," and

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(salmon are "a cultural touchstone and economic engine" for the state).

[50] *See also* Wash. State Recreation and Conservation Office, *supra* n.29, at 1.

[51] *Id. See also* Nat'l Oceanic and Atmospheric Admin., *Economic Benefits of Salmon Restoration* (2014), http://www.westcoast.fisheries.noaa.gov/publications/education/factsheet-pcsrf_050514.pdf (noting that for every dollar invested in salmon restoration, the economy benefits multiple ways).

that "[r]emoving barrier culvers to fish passage is one of the most effective ways to increase salmon production in fresh water."[52] And a short educational video prepared by the Washington Department of Fish and Wildlife, "Making Way for Salmon," highlights barrier culvert replacement as a critical and effective salmon recovery tool:

> Salmon are a vital part of our history, our culture, and our economy here in Washington. The challenges facing them are accelerating, but we know how to help them. Salmon have shown us their resilience; they've shown us their persistence. We've even seen salmon recolonize a stream immediately after taking out a barrier, almost as if they're waiting for us to open the door for them. They're ours to save, and it starts by making way for salmon.[53]

Washington could not and does not question the importance of culvert removal, but the State nonetheless maintains in this litigation that the injunctive relief ordered by the district court will do nothing to improve the health of these imperiled salmon populations. The State offers several arguments to support its

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[52] *See* Wash. State Recreation and Conservation Office, *supra* n.29, at 3-4.

[53] Wash. Dep't of Fish and Wildlife, *Making Way for Salmon*, YouTube (Jan. 26, 2017), https://www.youtube.com/watch?v=X7z5anXzm0k, at 10:02-10:28. *See also id.* at 9:40 ("The reason this stream is so productive is because there's no fish passage barriers.").

internally conflicted position. None withstands scrutiny.

1. Replacing State Barrier Culverts Benefits Salmon Even Where Other Culverts Are Present.

While the State does not dispute the importance of barrier culvert removal as a general matter, the State argues that removing its barrier culverts will have "no impact" because there are many other culverts owned by local governments and private parties in the same watersheds. Wash. Br. 53. The State highlights the need for injunctive relief by attempting to spread the blame to justify its inaction. Removal of the State's barrier culverts will increase habitat even without any further action by other actors while also setting the stage for other responsible parties to become part of the solution.

The State notes that in the Case Area there are many more non-State culverts than State-owned culverts, but it does not logically follow that replacing State culverts "will make no difference to salmon." Wash. Br. 53. The State ignores the key fact that the majority of the State culverts subject to the injunction are *downstream* of local, private, or other non-State culverts, and so removing the State culvert is the key to unlocking the watershed. *See* JA 397a. The State also ignores the important distinction between culverts that block all fish passage and culverts that allow at least some fish to pass. Many of the non-State

culverts in the Case Area are only partial barriers. *See* JA 543a. In such cases, once a State barrier culvert is removed, at least some fish will be able to access additional habitat even if a partial barrier remains.

Even if a non-State culvert currently bars all fish passage, there is no reason to believe that replacing the State barrier culvert will have "no impact" at the end of the day. As Washington's Department of Fish and Wildlife has explained, removal and replacement of barrier culverts owned by private parties and local governments is also ongoing throughout the state. For example, Ebright Creek – now one of the most productive salmon streams for Kokanee salmon off of Lake Sammamish – is accessible to salmon due to a barrier culvert that was replaced on private property.[54] The private-land forest industry has removed close to 5,000 fish passage barriers since 2000, opening up 4,000 miles of additional fish habitat.[55] Washington's counties are working to replace their culverts as well, focusing on the culverts that would open access to areas where industrial forest landowners and small private landowners have already taken steps to remove fish passage barriers.[56] And Tribes are working to find funding and lend their expertise to help private landowners and others remove culverts in areas like the Salt Creek watershed because culvert replacement

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[54] *Making Way for Salmon*, *supra* n.53 at 3:20-:44.

[55] *Id.* at 5:30.

[56] *Id.* at 7:38.

provides "the biggest bang for your buck" compared to other habitat restoration projects. JA 689a.

The State itself also offers assistance for culvert replacement projects. *See* Wash Br. 11. These State assistance programs prioritize opportunities to correct multiple barriers throughout a stream, including through state-local partnerships to address city and county barriers in the same stream systems as State barriers. Wash. Rev. Code § 77.95.180. These programs also consider the amount of habitat a given project will make available in prioritizing and funding projects, *see, e.g.*, Wash. Rev. Code § 76.13.150(6)(a); Wash. Rev. Code § 77.95.160(2)(e), so local anglers can effectively advocate for the replacement of locally owned culverts once State-owned barrier culverts on the same stream have been fixed. And non-State culverts may need to be removed or replaced at the end of their natural life or as part of a larger project. The district court's order requires the State to replace its high-priority barrier culverts over the course of 17 years; low-priority barrier culverts may be replaced on an even longer timeline. There is no reason to assume that non-State barrier culverts will remain unrepaired for 17 years or more.

At bottom, the State's argument for inaction leaves no one with an obligation to take the first step by removing culverts on a stream blocked in multiple places. A culvert replacement stalemate serves no one – not the salmon that desperately need additional habitat, not the river guides and commercial fishing families who depend on healthy runs for their livelihood,

and not the anglers who find their peace in time on the water.

2. Other Recovery Measures Cannot Substitute For Culvert Removal.

The State next argues (at 55-56) that it should be allowed to allocate resources between barrier culvert removal and other salmon recovery efforts as it sees fit. *See also* Wash. Br. 9-13. The State asserts that it will adequately protect salmon without intervention from the Court, but this assertion cannot be reconciled with the decades-long and continuing decline in these species and the communities that depend on them. While amici agree that the State should have every incentive to protect this valuable resource, actual recovery measures have lagged far behind good intentions, and the district court correctly found that the steps taken so far have not led to recovery of these imperiled species. Pet. App. 167a (summarizing status report findings that salmon are declining and habitat degradation is a primary cause).

Moreover, there is reason to doubt that the State will pursue these other salmon recovery programs even if relieved of its obligation to repair its barrier culverts. Washington's record on salmon recovery is mixed at best, and some of the limited salmon recovery measures the State now heralds were only adopted following litigation compelling Washington to act. For example, the State singles out its "stormwater management projects," Wash. Br. 55-56, but neglects to

note that it took years of litigation to compel Washington to adopt standards to reduce polluted storm water entering salmon streams. *See, e.g.*, *Puget Soundkeeper Alliance v. Wash. Dep't of Ecology*, Findings of Fact, Conclusions of Law, and Order, PCHB Nos. 07-021, 07-026, 07-027, 07-028, 07-029, 07-030, 07-037 (Aug. 8, 2008).[57] Similarly, Washington law has long required protection of minimum instream flow levels for salmon, Wash. Rev. Code § 90.54.020, but for a number of watersheds in the Case Area, the State has failed to issue any protected instream flow levels.[58] And even where Washington has designated protected flow levels, the State had to be compelled through litigation to actually protect this flow level from new withdrawals. *See, e.g.*, *Swinomish Indian Tribal Community v. Wash. State Dep't of Ecology*, 178 Wash. 2d 571, 311 P.3d 6 (2013); *Foster v. Wash. State Dep't of Ecology*, 184 Wash. 2d 465, 362 P.3d 959 (2015). Given that the State has taken meaningful action on many critical salmon protections only when compelled to do so, there is good reason to be skeptical that the State will suddenly redouble its efforts if left to its own devices.

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[57] *See also* Blake E. Feist et al., *Roads to Ruin: Conservation Threats to a Sentinel Species Across an Urban Gradient*, 0 Ecological Applications at 1 (2017), https://www.documentcloud.org/documents/4111834-Feist-Et-Al-Pre-Print-2017.html (salmon and especially coho are exceptionally sensitive to the harmful effects of toxic urban storm water runoff).

[58] *See* Wash. Dep't of Ecology, *Instream Flow Rule Status* (2016), https://fortress.wa.gov/ecy/wrx/wrx/fsvr/ecylcyfsvrxfile/WaterRights/wrwebpdf/wsisf.pdf (map of instream flow status by watershed).

The State touts its salmon recovery plans (at 10), but at the time of trial the State had completed recovery plans for only two of the salmon runs in the Case Area, and the two plans that did exist were not enforceable. Pet. App. 156a.[59] The State's former Director of the Department of Fish and Wildlife testified that the State needed to take a comprehensive look at recovery in each watershed, but "we just haven't had the money and the personnel to get it done." JA 746a-747a. The State also points to programs that provide State assistance for voluntary culvert removal programs. Wash. Br. 10-11. Clearly, the State can and should continue to provide assistance to private landowners and local governments that choose to take steps to improve salmon habitat. *See, e.g.*, Wash. Rev. Code § 76.13.150 (assistance for small forest landowners to replace barrier culverts); Wash. Rev. Code § 77.95.060 (state will encourage the development of regional fisheries enhancement groups); Wash. Rev. Code § 77.85.050 (habitat projects under the Salmon Recovery Act "shall not be considered mandatory in nature"). But such voluntary programs cannot substitute for the immediate increase in salmon habitat that will result from the State's replacement of its own barrier culverts.

Finally, while the State argues that it was already working to replace its barrier culverts, the evidence tells a different story. The district court found that it would take more than 100 years to correct the barrier culverts that block significant habitat if the State

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[59] Columbia and Snake River runs are not in the Case Area. *See* JA 287a, 286a.

continued at the pace it kept prior to the injunction. Pet. App. 162a-163a. Given the precariously low population levels of many of these runs, the State's protracted timeframe might well be too late for these species. Even more telling, the number of barrier culverts *increased* between the State's initial inventory and post-trial briefing. Pet. App. 163a-164a. As the district court found, at that pace the State would never finish the task of correcting the barrier culverts. Pet. App. 164a ("Extrapolation from these data would lead to the untenable conclusion that under the current State approach, the problem of WSDOT barrier culverts in the Case Area will never be solved."). This is not success, nor even progress, and the State's argument that it has adequate incentive to correct the problem without intervention from the district court cannot be squared with the facts and the State's own actions.

The State's plea for discretion to prioritize between barrier culvert removal and other efforts as it sees fit would retain the status quo, a status that is harming salmon and the communities that rely on them. The State has been attempting to recover salmon, with limited barrier culvert removal as a component of its efforts, for years – with little to show by way of reduction in the number of barriers or actual recovery of these species. The State has not produced credible evidence that measures that have to date fallen short will suddenly and inexplicably produce different results. The district court's intervention was necessary to ensure timely removal of culverts that block access to vast areas of salmon habitat.

3. There Is Ample Evidence That Culvert Replacement Benefits Salmon.

The district court found that opening up additional habitat by removing barrier culverts would have a significant, positive effect on salmon populations. Pet. App. 166a-167a (Removing barrier culverts "provides immediate benefit in terms of salmon production, as salmon rapidly re-colonize the upstream area and returning adults spawn there."). This finding was based on evidence that barrier culverts lead directly to reduced salmon populations, and that conversely, culvert removal quickly increases populations. *See, e.g.*, Pet. App. 161a (a 1994 analysis of loss of coho salmon production in the Skagit River watershed determined 44% to 58% of the loss of salmon production in tributaries was attributable to barrier culverts); JA 402a ("Correction of barriers to salmon migration often results in a rapid response to colonizing salmon and has been shown to quickly result in increases in juvenile and adult salmon."); JA 427a (Barrier culverts are "one of the most recurrent and correctable obstacles to healthy salmonid stocks in Washington."); JA 422a-425a (fish rapidly colonize new habitat after a barrier is removed); JA 686a ("As commonly recognized by fisheries biologists .... 'Correction of human-made fish passage barriers is one of the most cost effective methods of salmonid enhancement and restoration.'").

More recent research confirms the district court's findings. For example, in a comprehensive study of the effectiveness of habitat improvement projects prepared for several federal agencies in 2016, a team of

scientists concluded that culvert replacement provides significant benefits to salmon.

> Studies evaluating the effectiveness of projects that have removed impassable culverts/dams or have installed fish passage structures in North America and elsewhere have consistently shown rapid colonization by fishes, with colonization time positively correlated with distance of nearby source populations and the abundance of the source populations. The success of fish passage through culverts and fish passage structures depends on appropriate design and installation (e.g., slope, width, length, percent the culvert is countersunk), as well as regular maintenance. The benefits to fish populations from the removal of culverts, small dams, and other migration barriers have been well documented in North America, Europe, and Asia. Studies show that fish typically migrate upstream and colonize new habitats rapidly. For example, the installation of a fish passage structure on a water diversion dam on the Cedar River in Washington State resulted in the recolonization of newly accessible habitat by juvenile and adult salmon and steelhead within 5 years.[60]

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[60] T. Hillman et al., Effectiveness of tributary habitat enhancement projects, Report to Bonneville Power Administration, at 21 (2016) (internal citations omitted), http://www.ucsrb.org/?mdocs-file=2322.

The State attempts to undermine the well-established facts found by the district court by noting (at 57) that salmon harvests have fluctuated over time. While harvests do fluctuate from year to year, the overall trend has been one of sharp decline. *See* JA 589a (the combination of fluctuating ocean conditions and degrading or shrinking freshwater habitat will lead to salmon abundance showing a pattern of fluctuating decline, as has been the case in the Skagit River in Washington).[61] The declining trend is especially evident when harvests are compared over the course of decades; harvests fluctuate annually but the declining trend through the 1980s and 1990s is clear. *See, e.g.*, JA 204a-205a (showing declining trend in total salmon harvest in western Washington by species from 1974 through 2003). Washington suggests (at 57) that salmon harvests have "rebound[ed]" from earlier lows by citing the total 2003 catch, but in fact salmon harvests remained at abysmally low levels in more recent years – the low commercial salmon catch in Washington 2008 and 2012, for example, shows that harvests continue their fluctuation between low and very low levels.[62] For some of Washington's commercial salmon fisheries, harvests in 2015 and 2016 were so low that

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[61] *See also supra* notes 26-33 and accompanying text.

[62] Nat'l Marine Fisheries Serv., Fisheries Economics of the United States, 2015, U.S. Dept. of Commerce, NOAA Tech. Memo. at 52 (2017) (showing annual commercial landings of salmon in Washington in thousands of pounds from 2006 through 2015), https://www.st.nmfs.noaa.gov/Assets/economics/publications/FEUS/FEUS-2015/Report-Chapters/FEUS%202015%20All%20Chapters_Final4_508.pdf.

several fishing-dependent communities qualified for federal disaster relief.[63] One less bad year does not undercut the decades-long declining trend in salmon harvests.

The State also complains (at 56-57) that culverts are not the only reason that salmon runs have declined. But the district court did not have to find that culverts were the *only* cause of declining populations to find that relief was warranted. The district court correctly found that barrier culverts that prevent salmon from reaching their spawning and rearing habitat are a major factor in the decline of salmon populations in Washington. Pet. App. 160a-162a. The district court also correctly found that removal of the State's barrier culverts would lead to significant increases in these imperiled populations. Pet. App. 166a-167a. The State's thinly-veiled attempt to change the subject by pointing to overfishing in the 1800s (at 56) does nothing to undermine the district court's careful and well supported findings of fact.

B. Removal Of Barrier Culverts Is In The Public Interest.

It is well-established that courts must consider the public interest in deciding whether to grant a request for injunctive relief. *See, e.g.*, *Monsanto Co. v. Geertson Seed Farms, Inc.*, 561 U.S. 139, 157, 130 S. Ct. 2743, 2756 (2010). The district court properly

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[63] *Supra* notes 45-47 and accompanying text.

considered the public interest and correctly held that it would be served by the order for injunctive relief:

> 18. The public interest will not be disserved by an injunction. To the contrary, it is in the public's interest, as well as the Tribes' to accelerate the pace of barrier correction. All fishermen, not just Tribal fishermen, will benefit from the increased production of salmon. Commercial fishermen will benefit economically, but recreational fishermen will benefit as well. The general public will benefit from the enhancement of the resource and the increased economic return from fishing in the State of Washington. The general public will also benefit from the environmental benefits of salmon habit restoration.

Pet. App. 178a. *See also* Pet. App. 121a.

The district court and Court of Appeals were correct to rely on these public interest considerations in deciding to grant injunctive relief. As discussed above, commercial salmon fishing supports thousands of Washington jobs and many Washington communities, and increases in salmon available for harvest create additional economic opportunities in the local fishing economy. Sport fishers – and the industry surrounding sport fishing – will benefit substantially from increases in salmon populations as well. For port communities in Washington and Alaska, particularly smaller communities that are heavily reliant on fishing, healthy salmon runs are essential.

The injunctive relief ordered by the district court will lead directly to increases in salmon runs. More fish mean higher catch limits, longer seasons, and fewer streams that are closed for all or part of a year. More fish mean that fishing families who have stretched to buy their first commercial boat will not lose their investment to foreclosure. More fish mean more anglers who travel from far and wide for a chance to hook a prized Hoh River chinook or winter Skagit steelhead, and more local hotels, restaurants, and shops who will enjoy their patronage. More fish mean more river guides who can make ends meet and more parents who can share their love of fishing with their children. More fish mean port towns that are thriving instead of qualifying for federal disaster relief. More fish mean truly living up to the promise that salmon are both our inheritance and our children's future. In short, the public interest weighs strongly in favor of the injunctive relief granted by the district court. The district court did not abuse its discretion in granting injunctive relief to the Tribes.

CONCLUSION

Salmon are vital to fishing families and communities throughout Washington, Alaska, and the Pacific Northwest. As the district court found, removing culverts that prevent salmon from accessing key habitat across western Washington is one of the best ways to save these iconic fish. Amici respectfully submit that

the district court's injunction should be upheld in all respects.

Respectfully submitted,

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